

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT**

Middlesex, ss.

Civil Action No.

**JOHN PITKIN, MICHAEL REPUCCI, MEGAN
BROOK, DEBRA MANDEL, SARA MAE BERMAN,
JONATHAN M. HARRIS, and GARY MITCHELL,**

Plaintiffs,

v.

**CITY OF CAMBRIDGE, CAMBRIDGE BOARD
OF ZONING APPEALS, CONSTANTINE
ALEXANDER, as he is Chair of the BOARD OF
ZONING APPEALS, and BRENDAN SULLIVAN,
JANET O. GREEN, ANDREA A. HICKEY, SLATER
W. ANDERSON, ALISON HAMMER, JIM
MONTEVERDE, and LAURA WERNICK, as they are
members of the BOARD OF ZONING APPEALS of
the CITY OF CAMBRIDGE**

Defendants.

VERIFIED COMPLAINT

INTRODUCTION

1. This is an appeal pursuant to G.L. c. 40A, § 17, the Massachusetts Zoning Act, of the Cambridge Board of Zoning Appeal's erroneous decision not to apply the City's Zoning Ordinance to the City's construction project in the Open Space District in Inman Square.
2. On January 14, 2019, Petitioners filed a formal Request for Zoning Enforcement with the Cambridge Commissioner of Inspectional Services ("Commissioner"), seeking to prevent construction in Vellucci Plaza, the Open Space District located in Inman Square, without properly issued approvals required under the Zoning Ordinance.

3. On January 28, 2019, the Commissioner denied the Petitioners' Request for Zoning Enforcement.
4. On February 1, 2019, Petitioners filed an appeal of that decision with the Cambridge Board of Zoning Appeal (the "Board").
5. On April 26, 2019, the Board issued a decision denying that appeal.
6. This action is an appeal of the Board's April 26, 2019 decision ("Decision"). A certified copy of the Decision is attached hereto as Exhibit A.
7. This is also an action under G.L. c. 214, § 1, seeking an injunction to prohibit the Defendant City of Cambridge from continuing construction and seeking any remaining approvals for work in Vellucci Plaza until the Planning Board review required by Cambridge Zoning Ordinance ("Ordinance") § 4.25 is complete and a Special Permit pursuant to Cambridge Zoning Ordinance § 10.20 is properly issued.
8. This is also an action seeking declaratory judgment that municipal construction projects are subject to § 4.25 of the Ordinance, unless they are explicitly allowed by right under the Ordinance.
9. Petitioners filed their January 14, 2019 Request for Zoning Enforcement because the City of Cambridge commenced a construction project in Vellucci Plaza, which is zoned Open Space District, without following the prescribed procedures in Ordinance § 4.25, and without seeking a Special Permit as required by § 4.12 and § 4.33.f (4).
10. Hampshire Street and Cambridge Street intersect in Inman Square, creating an oblong four-way intersection. Vellucci Plaza occupies one of the narrow wedges created by the intersection. *See* diagram showing current intersection configuration, Exhibit B.

11. The construction project is the physical reconfiguration of the Hampshire Street and Cambridge Street intersection in Inman Square (“Project”). The Project consists of removing trees and benches, planters, and pedestrian spaces in the Open Space District, excavating the space to install underground utilities, and paving the Open Space so Hampshire Street can run directly over it.
12. Plaintiffs assert that the Board acted outside the authority of its jurisdiction, unreasonably, arbitrarily, and without substantial evidence by failing to apply the Ordinance to the facts in the record for whether the Project is a Municipal Service Facility and requires a Special Permit.
13. Plaintiffs are aggrieved citizens, and aggrieved owners and operators of businesses in Inman Square.
14. Plaintiffs seek to annul the Board’s Decision as being arbitrary, unreasonable, unsupported by substantial evidence, and exceeding the authority of the Board.
15. This Complaint is filed within twenty (20) days of April 26, 2019.
16. Notice of this Complaint is given to the Cambridge City Clerk within twenty (20) days of April 26, 2019.

JURISDICTION AND VENUE

17. Jurisdiction is conferred upon the Land Court by G.L. c. 40A, § 17; G.L. c. 214, § 1; and G.L. c. 231A.
18. Venue lies in the Land Court pursuant to G.L. c. 40A, § 17; G.L. c. 214, § 1; and G.L. c. 231A.

PARTIES

19. Plaintiff John Pitkin is an individual who resides at 18 Fayette Street, Cambridge, Middlesex County, Massachusetts, 02139. He walks through nearby Vellucci Plaza more than twice a day when he travels between his residence and Inman Square and nearby Somerville. Mr. Pitkin is a regular patron of the Inman Pharmacy and S&S Restaurant, and his access to these establishments will be compromised by the Project. Mr. Pitkin also regularly met up with acquaintances and friends in Vellucci Plaza and attended events there prior to the City's closing of the space for Project construction.
20. Plaintiff Michael Repucci is an individual residing at 21 Emerson Street, Belmont, Middlesex County, Massachusetts, 02478. He is the owner of the Inman Pharmacy, which is located at 1414 Cambridge Street, Cambridge, Middlesex County, Massachusetts, 02139. The Inman Pharmacy is an independent drug store serving residents of the Inman Square, greater Cambridge, and the regional Portuguese-speaking population. The proposed reconfiguration of Hampshire Street will almost double the volume of traffic in front of the Pharmacy, direct new headlight glare into the front window and entrance to the Pharmacy, and create multiple new conflicts and hazards in the intersection in front of the Pharmacy. The Hampshire Street reconfiguration will eliminate up to half of all public parking spaces in the vicinity of the Pharmacy, and this makes it more difficult for many of his customers to pick up prescriptions. The construction of the Project, estimated to take at least two years, will inhibit pedestrian and vehicular access to the Pharmacy, jeopardizing the business.
21. Plaintiff Megan Brook is an individual residing at 103 Inman Street, Cambridge, Middlesex County, Massachusetts, 20139. She is retirement age and walking is her

primary mode of transportation. She does not drive. She relies on the nearby services in Inman Square to supply her with necessities. The proposed Project will impede and add new hazards to Ms. Brook's pedestrian access to these necessary goods and services, both during and after construction.

22. Plaintiff Debra Mandel is an individual who owns and resides in Unit 3 at 240 Hampshire Street, Cambridge, Middlesex County, Massachusetts, 02139. She has lived there since 1985. Her condominium abuts Hampshire Street and Vellucci Plaza, and Ms. Mandel's home faces Vellucci Plaza. The reconfiguration of Hampshire Street brings the busy street much closer to her home than the street currently exists. This closer proximity of vehicles will increase noise and light from both vehicles and street lights, and will interfere with the quiet enjoyment of her property. The removal of trees in Vellucci Plaza in preparation for the Project is already allowing more sun to penetrate her home, and will make it hotter than normal in summer months. This will also require her to run her air conditioning for longer periods of time to minimize both the heat and noise from construction and the new traffic pattern. The replacement of a public park with a multi-lane road immediately adjacent to her home will reduce the value and enjoyment of her property. The construction of the Project, estimated to take at least two years, will interfere with the quiet enjoyment of her home, and interfere with vehicular and pedestrian access to her property, adding inconvenience to her and those coming to visit.

23. Sara Mae Berman is an individual residing at 23 Fayette Street, Cambridge, Middlesex County, Massachusetts, 02139. Ms. Berman and her children and grandchildren walk through nearby Vellucci Plaza on their way to businesses in Inman Square. Ms.

Berman is a frequent patron of Inman Square businesses. The Project will interfere with Ms. Berman's ability to access those businesses.

24. Plaintiff Jonathan M. Harris is an individual residing at 9 Marie Avenue, Cambridge, Middlesex County, Massachusetts, 02139. Jonathan M. Harris has lived with his family in the Inman Square area for more than thirty years. Mr. Harris passes through Inman Square almost daily, including walking, bicycling, and driving. He and his family are frequent patrons of Inman Square businesses including the Inman Pharmacy and the S&S Deli and Restaurant. His enjoyment of the area will be significantly affected by the loss of open space and tree canopy in Vellucci Park, increased traffic and business impacts during the several year construction period, and permanent loss of parking spaces in the Inman Square area.
25. Plaintiff Gary Mitchell is an individual residing at 160 Partridge Lane, Concord, Middlesex County, Massachusetts, 01742. He is an owner of the S&S Deli and Restaurant in Inman Square, which is located at 1334 Cambridge Street, Cambridge, Middlesex County, Massachusetts, 02139. He also is an owner of the 1360 Cambridge Street Realty and offices, located at 1360 Cambridge Street, Cambridge, Middlesex County, Massachusetts 02139. The continued operation of S&S Restaurant and Deli will be uniquely adversely affected by the increase in street pavement close by the business because it reduces and constrains pedestrian thoroughfares and foot traffic access to the restaurant. The proposed street reconfiguration also reduces on-street public parking and will limit the number of parking spots for patrons.
26. Applying the Special Permit provisions, conducting the required review, satisfying the criteria, and conditioning any Special Permit, if granted, requiring the Project to obey

the Ordinance, would address, avoid, minimize, mitigate, or even prevent these unique adverse impacts to each and all of the Plaintiffs.

27. Defendant City of Cambridge is a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts with its principal place of business at 795 Massachusetts Avenue, Cambridge, Middlesex County, Massachusetts, 02139.
28. Defendants are Constantine Alexander, Brendan Sullivan, Janet O. Green, Andrea A. Hickey, Slater W. Anderson, Alison Hammer, Jim Montverde, and Laura Wernick, as they serve or served as the members of the Board who made the determination to deny the Petitioner's petition. Upon information and belief, the residential addresses of the Board members in Cambridge, Massachusetts, are as follows:

Constantine Alexander, Chair	3 Whittier St., Cambridge, MA 02140
Brendan Sullivan, Vice Chair	120 Garden St., Cambridge, MA 02138
Janet O. Green	19 Francis Ave., Cambridge, MA 02138
Andrea A. Hickey	10 Rogers Street, #223, Cambridge, MA 02142
Slater W. Anderson	2 Hollis St., Cambridge MA, 02140
Alison Hammer	556 Franklin St., #3, Cambridge, MA 02139
Jim Monteverde	12 Oak St., Cambridge, MA 02139
Laura Wernick	46 Sacramento St., Cambridge, MA 02138

The Defendant Board members are sued in their official capacity, not personally.

29. The Defendant Cambridge Board of Zoning Appeal is a municipal body duly authorized under the laws of the Commonwealth of Massachusetts and Cambridge Zoning Ordinance Article 10, § 10.10 to hear and decide appeals as provided by G.L. c. 40A § 8, and by § 10.20 of the Cambridge Zoning Ordinances. The Board's offices are located at 831 Massachusetts Avenue, Cambridge, Middlesex County, Massachusetts, 02139.

FACTS

30. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 29 of this Complaint.
31. The City of Cambridge acquired Vellucci Plaza by Eminent Domain in 1980. The taking in fee simple was “for the purpose of public recreation open space.”
32. The purpose of the Ordinance includes “to conserve the value of land and buildings, including the conservation of natural resources” and “encourage the most rational use of land throughout the city” including “the protection of residential neighborhoods from incompatible activities.” Ordinance, §1.30, Purpose.
33. The first Zoning District listed in the Ordinance is the Open Space District.
34. The Open Space District is described as “Public Parks and recreation facilities and other public facilities.” Ordinance, § 3.11(1).
35. Section 2.00 of the Ordinance provides that Public Open Space “shall not include rooftop areas, balconies, parking lots, or driveways. Limited paved surfaces may be designed to accommodate occasional use by motor vehicles servicing the park facility....”
36. The Ordinance defines the location and boundaries of the Open Space District as shown on the map entitled “Zoning Map of Cambridge,” which map is attached to and makes part of the Ordinance. Ordinance, § 3.21.
37. Vellucci Plaza is marked as within the Open Space District on the current Cambridge Zoning Map.
38. The Cambridge Community Development Department issued *The Zoning Guide—A User Guide to the Cambridge Zoning Ordinance*.

39. The current *Zoning Guide* includes the following: “***Open Space District*** was created to safeguard the interests of Cambridge residents with respect to public open space. It is applicable to certain municipal open spaces which could be encroached upon for other purposes. Public parks, playgrounds, and public recreation buildings are the only uses permitted as-of-right in open space districts.” *The Zoning Guide*, page 6.
40. Vellucci Plaza is a municipally-owned property within the Open Space District in Cambridge.
41. On or around June 22, 2016, the City of Cambridge Traffic, Parking, and Transportation Department presented initial recommendations for a reconfiguration of the Hampshire Street and Cambridge Street intersection.
42. On or around May 2, 2018, the City of Cambridge presented its preferred design option, which consisted of rerouting Hampshire Street to run directly through Vellucci Plaza (the Open Space District).
43. Cambridge Zoning Ordinance § 4.25 is entitled “Non Open Space Uses in Open Space Districts.”
44. Ordinance § 4.25 requires that “all uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance, or other approval....”
45. The City of Cambridge has applied for and obtained approvals for other work in the Open Space District, but only after following the other necessary local and state procedures.

46. On or around April 10, 2018, the City Arborist held a tree hearing pursuant to G.L. c. 87 on removal of public shade trees in Vellucci Plaza for the Project. On or around April 20, 2018 the City Arborist recommended the removal of the trees for the sake of the Project.
47. On or around July 25, 2018, a vote of the Legislature was taken pursuant to Article 97 of the Amendments of the Massachusetts Constitution to release Vellucci Plaza from Article 97 protection. The legislation was signed by Governor Baker on August 3, 2018.
48. Ordinance § 4.25.1 requires that before any approvals are issued for non-open space use in an Open Space District, a proponent shall file a report with the Planning Board and file it with the City Clerk.
49. Ordinance §4.25.1 requires that said report includes an analysis of alternatives, evaluation of the anticipated impacts of the development, evaluation of the impact upon other land uses in the neighborhood, and the availability of recreational open space for residents of the area. The Planning Board shall then prepare its own report with recommendations concerning the proposed development, including conditions that should be attached to such action.
50. The City of Cambridge has not filed a report with the Planning Board pursuant to § 4.25.1 for the Project.
51. Ordinance § 4.13 provides that “no building, structure, or land in any district may be used, erected, or designed to be used, in whole or in part, for any use not listed in Section 4.30....”

52. Ordinance § 4.33.f presents the table of uses showing what uses are prohibited, allowed by right, and allowed by Special Permit in the Open Space District.
53. Ordinance § 4.33.f (4) specifies that a Municipal Service Facility requires a Special Permit before that use can begin in the Open Space District.
54. Ordinance § 2.00 defines as Municipal Service Facility as “[u]se of land or structures by the City of Cambridge, or other municipality for maintenance operations, public utilities, public works and similar government functions.”
55. Ordinance § 10.43 provides the criteria for Special Permits. A Special Permit will normally be granted “except when particulars of the location or use, not generally true of the district or of the uses permitted in it, would cause granting of such permit to be the detriment of the public interest because:
- a) It appears that requirements of this Ordinance cannot or will not be met, or
 - b) Traffic generated or patterns of access or egress would cause congestion, hazard, or substantial change in established neighborhood character, or
 - c) The continued operation of or the development of adjacent uses as permitted in the Zoning Ordinance would be adversely affected by the nature of the proposed use, or
 - d) Nuisance or hazard would be created to the detriment of the health, safety and/or welfare of the occupant of the proposed use or the citizens of the City; or
 - e) For other reasons, the proposed use would impair the integrity of the district or adjoining district, or otherwise derogate from the intent and purpose of this Ordinance; and
 - f) The new use or building construction is inconsistent with the Urban Design Objectives set forth in Section 19.30.”
56. On or around February 2019, the City of Cambridge posted a construction notice on their website, announcing that as part of the Project, “Eversource gas will be performing gas main replacement and realignment beginning on or about February 25, 2019.” The map affiliated with the announcement shows gas lines to be installed in and under Vellucci Plaza.

57. The Project consists of the City of Cambridge using the Open Space District for public utilities.
58. As of May 10, 2019, the City of Cambridge has removed trees in the Open Space District, removed benches and planters, cordoned off the Plaza from public access, and began excavating and installing underground utilities within the bounds of Vellucci Plaza.
59. The City of Cambridge has not sought Planning Board Review for the Project as required by § 4.25 of the Ordinances, and has not sought a Special Permit for the Project as required by § 4.33.f (4) pursuant to § 10.20 of the Ordinances.

PROCEEDINGS

60. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 59 of this Complaint.
61. On January 14, 2019, Petitioners filed a formal Request for Zoning Enforcement with the Commissioner. *See* Exhibit C.
62. On January 28, 2019, the Commissioner denied the Request for Zoning Enforcement. *See* Exhibit D.
63. On February 1, 2019, Petitioners filed an appeal of that decision with the Board. *See* Exhibit E.
64. On February 28, 2019 the Board held a public hearing on Petitioners' Request for Zoning Enforcement, Case No. BZA-017068-2019. Sitting members of the Board were Constantine Alexander (presiding), Brendan Sullivan, Andrea Hickey, Jim Monteverde, and Laura Wernick. The hearing was standing room only.

65. Petitioners' Counsel presented how the Project was subject to review under § 4.25 of the Ordinance, and how it also needed a special permit to proceed. There were no questions from the Board.
66. Over an hour of public comment followed. Many public comments pointed out that the Ordinance plainly requires Planning Board review for the Project, at a minimum, before any non-open space use can occur in the Open Space District.
67. The Board requested a continuance to allow time to obtain a legal opinion from the City Solicitor. The Board indicated that the City Solicitor would issue an opinion on the matter by March 21, 2019, and Petitioners would have until April 8, 2019 to respond. Petitioners agreed and the Board voted to continue the hearing to April 11, 2019.
68. The City Solicitor submitted the requested letter, erroneously equating laying out a public way with the physical construction of a roadway, and concluding that both are exempt from zoning.
69. On April 8, 2019, Petitioners' Counsel submitted her response to the Solicitor's letter to the Board, laying out applicable case law and statutory requirements for the procedural act of relocating a public way, and distinguishing it from an on-the-ground road construction project.
70. On April 11, 2019, the Board resumed the hearing. Again, there was standing room only. After about forty minutes of comments, the Board voted to close the public hearing.
71. The Chair then read prepared written remarks, apparently drafted before that night of the hearing, concluding with his intention to vote to deny the appeal. Board Member

Jim Monteverde spoke next, saying the decision was “on a knife’s edge.” No other board members made any individual statements. The Board voted 5-0 not to grant the petition to overrule the Commissioner’s decision.

72. Pursuant to G.L. c. 40A, § 17, Plaintiffs hereby appeal the Board’s Decision.

DECISION

73. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 72 of this Complaint.

74. On April 26, 2019, the Board issued a four-page Decision denying Petitioners’ appeal for zoning enforcement. *See* Exhibit A.

75. The Decision on page 2 erroneously and without support states that City Council would not have intended an “Ordinance it enacted dealing with land use, primarily private land use” to subject the City Council to a Planning Board hearing.

76. The Decision erroneously omits the fact that the purpose of Ordinance § 4.25 is to apply to public, not private land use. Ordinance § 4.25 “is to provide for public notification and review of governmental and institutional nonopen space development statutorily exempt from prohibition in Open Space Districts.” (*emphasis added*).

77. The Decision erroneously omits that only public parks, recreation facilities, and certain public facilities can be in an Open Space District.

78. The Decision erroneously makes the actions of the City Council exempt from § 4.25, violating the plain language of the Ordinance, ignores that § 4.25 only applies to municipal land, and ignores that some municipal land is owned by the City Council.

79. The Decision on page 2 erroneously and irrelevantly reasons that § 4.25 does not apply to the Project because “a driveway is not the same as a public roadway.” The

issue before the Board in fact was whether the proposed Project is a Non-Open Space Use occurring in the Open Space District without proper approval.

80. Ordinance § 4.25 requires that “all uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance, or other approval....”
81. The Decision erroneously fails to apply the criteria in the Ordinance to the Project.
82. Nowhere in the Decision does the Board consider the purpose of the Open Space District.
83. The Decision erroneously reasons that the Project is a “public way relocation” and exempt from zoning, despite ample evidence that a “public way relocation” is a procedural process, and the Project is physical on-the-ground construction subject to the Ordinance.

CAUSES OF ACTION

COUNT I – G.L. c. 40A, §17

84. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 83 of this Complaint.
85. The Decision by the Board to deny Petitioner’s Request for Zoning Enforcement was arbitrary, capricious, unsupported by the evidence, contrary to law, and exceeded the authority of the Board. The Plaintiffs are aggrieved by said Decision, and request that it be annulled.

COUNT II – INJUNCTION (G.L. c. 214, §1)

86. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 85 of this Complaint.
87. There is an actual controversy between Plaintiffs and Defendants.
88. Plaintiffs are likely to succeed on the merits of this claim that, as discussed above, the Board lacked authority to deny the Zoning Enforcement Request because the facts presented to the Board contradicted its findings, and the Board's Decision ignored the criteria established by the Ordinance.
89. Therefore, Plaintiffs are entitled to an injunction prohibiting the City of Cambridge from continuing any and all construction work in the Open Space District until this appeal is resolved.

COUNT III – DECLARATORY JUDGEMENT (G.L. c. 321A)

90. Plaintiffs hereby restate and incorporate by reference the allegations and statements contained in paragraphs 1 through 89 of this Complaint.
91. There is an actual controversy between Plaintiffs and Defendants.
92. Plaintiffs are entitled to a declaration that municipal construction projects are subject to § 4.25 of the Ordinance, unless they are explicitly allowed by right under the Ordinance.

PRAYERS FOR RELIEF

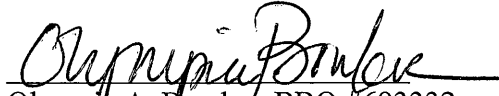
WHEREFORE, the Plaintiffs respectfully request that this Honorable Court:

- A. Declare, adjudge, and decree that the action of the Decision of the Defendant Board exceeded its authority, was based on errors of law, was arbitrary, capricious, and unsupported by the evidence, and must be annulled;
- B. Issue an injunction prohibiting The City of Cambridge from continuing construction work in Vellucci Plaza;
- C. Declare that municipal construction projects are subject to § 4.25 of the Ordinance unless they are explicitly allowed by right; and

D. Such other and further relief as justice so requires.

Respectfully,
Plaintiffs,

By their attorneys,



Olympia A. Bowker, BBO #693332

Nathaniel Stevens, BBO #634859

Gregor I. McGregor, BBO #334680

McGregor & Legere, P.C.

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Boston, MA 02108

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obowker@mcgregorlaw.com

nstevens@mcgregorlaw.com

gimcg@mcgregorlaw.com

Dated: May 15, 2019

VERIFICATION

I, John Pitkin, being duly sworn, hereby depose and say that I am one of the plaintiffs in the above-entitled action, that I have read the foregoing complaint and know the contents thereof; and that the same is true of my own knowledge, except as to matters stated to be on information and belief and as to those matters I believe them to be true.

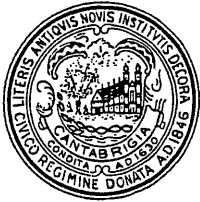
Subscribed and sworn to under the pains and penalties of perjury

Date: May 15, 2019



John Pitkin

EXHIBIT A



City of Cambridge

MASSACHUSETTS

BOARD OF ZONING APPEAL

831 Mass Avenue, Cambridge, MA.
(617) 349-6100

2019 APR 26 AM 10:51
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

CASE NO: BZA-017068-2019

LOCATION: 1407 Cambridge St. (Vellucci Plaza) Open Space
Cambridge, MA

PETITIONER: John Pitkin

PETITION: **Appeal:** Appeal the letter from Commissioner of Inspectional Services dated January 28, 2019, regarding Zoning Enforcement Request for Vellucci Plaza.

VIOLATIONS: Art. 10.000, Sec. 10.20 (Appeal).

DATE OF PUBLIC NOTICE: February 14 & 21, 2019

DATE OF PUBLIC HEARING: February 28, 2019 & April 11, 2019

MEMBERS OF THE BOARD:

CONSTANTINE ALEXANDER – CHAIR
BRENDAN SULLIVAN – VICE-CHAIR
JANET O. GREEN
ANDREA A. HICKEY

✓
✓
✓
✓

ASSOCIATE MEMBERS:

SLATER W. ANDERSON
ALISON HAMMER
JIM MONTEVERDE
LAURA WERNICK

✓
✓
✓
✓

Members of the Board of Zoning Appeal heard testimony and viewed materials submitted regarding the above request for relief from the requirements of the Cambridge Zoning Ordinance. The Board is familiar with the location of the petitioner's property, the layout and other characteristics as well as the surrounding district.

MAY 09 2019

CERTIFIED COPY

Donna P. Lopez
City Clerk

Case No. BZA-017068-2019
Location: 1407 Cambridge Street
Petitioner: John Pitkin

On February 28, 2019, Petitioner John Pitkin appeared before the Board of Zoning Appeal with his attorney Olympia Bowker to appeal the letter from the Commissioner of the Inspectional Services Department dated January 28, 2019, regarding the Zoning Enforcement Request for Vellucci Plaza. At the February 28, 2019 hearing the parties agreed to continue the hearing until April 11, 2019. At the April 11, 2019 hearing, the Petitioner and Attorney Bowker again appeared before the Board. The Petitioner submitted application materials in support of his appeal.

Attorney Bowker requested that the Board of Zoning Appeal reverse the determination of the Commissioner of the Inspectional Services Department that the Vellucci Plaza project was not subject to the Cambridge Zoning Ordinance ("Ordinance"), did not require Planning Board review under Article 4, Section 4.25 of the Ordinance, and was not properly classified as a Municipal Services Facility. She stated that Vellucci Plaza was zoned as an Open Space district and so Planning Board review of the City's project was required under Article 4, Section 4.25 of the Ordinance, and the project constitutes a Municipal Services Facility, for which a special permit was required.

Members of the public wrote and/or spoke in support and in opposition to the appeal.

After discussion, the Chair, based on the extensive briefs, documents submitted, arguments, and oral presentations, read the following statement:

"Most of the discussion that has taken place at our hearing has resolved around the wisdom, or lack thereof, of the proposed public way relocation at Inman Square and the process that has and has not been followed in arriving at this relocation decision. But the issues this Board has to resolve are narrow and legalistic, does Section 4.25 of our Zoning Ordinance require a hearing before the Planning Board with regard to the change to Vellucci Park resulting from the proposed road relocation and does Section 4.33.F of our Zoning Ordinance require a Special Permit from our Board for this project. The Commissioner of the Inspectional Services Department says no, and I agree with him.

Section 4.25 relied upon by the petitioners deals with changes to open spaces in open space districts designated by our Zoning Ordinance but not all changes. Let me quote from the memorandum prepared by the petitioner's very able counsel that accompanied the petitioner's petition. Quote, "The Ordinance does not explicitly mention roadways as prohibited

in open space districts, but the prohibition of driveways in public open space districts by extension implies that a roadway is not an open space development; therefore, it is a non-open space development."

Note the words, quote, "by extension implies," hardly a compelling and strong statement, and the application of this implied extension would require us to equate a driveway to a public roadway. Very clearly, a driveway is not the same as a public roadway. So I find it difficult to find that Section 4.25 applies to the situation before us.

Let's continue the analysis. The City Council is responsible for the management of the City of Cambridge, and one of its most important responsibilities is the layout, relocation, and alteration of public ways. This is not an easy task, and often the discharge of this responsibility is met with controversy and challenges from those directly and immediately affected by the proposed action, as is the case with the proposed public roadway relocation at Inman Square.

The petitioners would have us find that the City Council through Section 4.25 of our Zoning Ordinance intended that its determination to be subject to, really limited by a Zoning Ordinance it adopted and that this Ordinance implies, not explicitly states, that this is so by reference to driveways.

In short, it is the petitioner's position that the City Council intended that its responsibilities regarding roadways be subject to a Planning Board hearing by an Ordinance it enacted dealing with land use, primarily private land use throughout the City.

It seems to me that this position turns the process on its head, requiring that the discharge of a primary responsibility of the City Council be first subject to a hearing, hearing by a Board appointed by the City Council. This could be so if our Zoning Ordinance is abundantly specific that this is so, but it is not, as I have pointed out.

The petitioner's argument is based on inference to language that is not directly on point to the issue before us. I believe our Ordinance must be quite specific before I would require the City Council to hold a Planning Board hearing with regard to do what it proposes to do involving Vellucci Park. I believe that a fair reading of our Zoning Ordinance does not require that and permits the City Council to proceed without Planning Board involvement.

And let me point out, as the petitioner's counsel acknowledges, that the City Council did proceed with the input of others. The proposed public way relocation has received approval for removal of public shade trees, a certificate of appropriateness by the Mid Cambridge Conservation District Commission, and approval for a whole new petition by the City Council to the state legislature for reuse of land protected by Article 97 of the state constitution.

It is true that the City Council did not seek a review by the Planning Board possibly because it was advised by the City Solicitor that such a review was not required. This does not mean that the City Council did not hold public hearings regarding the project. In fact, there is testimony at our prior hearing that the City did hold at least one public hearing concerning the project, a hearing that petitioners apparently found unsatisfactory.

Whether the City Council should have requested a hearing before the Planning Board was a decision it made and had the right to make. It chose not to. The important point is that the City Council did not proceed without holding hearings by others before making its decision.

The petitioners also assert that the proposed public roadway relocation in Inman Square constitutes a Municipal Services Facility as defined by our Zoning Ordinance and, therefore, requires a Special Permit from our board pursuant to Section 4.33.F of our Zoning Ordinance, which the City has not obtained or even sought.

But I believe the Commissioner's decision on this question is entirely correct. Let me quote from his letter. Quote, 'The laying out, relocation, or use of a public way does not fall under the definition of municipal service facility, which is defined as the use of land' -- let me repeat -- 'the use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, Public Works, and similar functions. A municipal service facility is the use of land or structures by the City or other municipality whereas based on the plain meaning of public way the proposed street location is the use of land by the public for travel. Any maintenance operations, public utilities, or Public Work projects within a public way or for the purposes of maintaining the public way or are incidental or accessory to the use of the public way for public travel.

Let me be clear that my views and maybe the views of my fellow Board members and, for all I know, the private view of the Commissioner are not an endorsement of any proposed street layout at Inman Square. Rather, they deal with the process that must be followed with regard to street layouts.

In short, the petitioners are speaking to the wrong audience. It is the City Council to which they needed to direct their concerns and objections. And if these concerns and objections were not addressed to their satisfaction, their recourse was, and is, to seek to throw the rascals out. This is the process that is required, not an appeal to our Zoning Board. And most strenuously, let me be more than clear that my reference to rascals is entirely figurative and should in no way be taken literally."

After further discussion, the Chair moved, based on the Petitioner's submissions, testimony and evidence presented to the Board ~~that~~ the Board grant the appeal of the letter from the Commissioner of the Inspectional Services Department dated January 28, 2019, regarding the Zoning Enforcement Request for Vellucci Plaza and overrule the decision of the Commissioner.

The five-member Board voted unanimously in opposition to granting the appeal (Alexander, Sullivan, Hickey, Monteverde, and Wernick). Therefore, the appeal is denied.

The Board adopted the Chair's statement above and the discussions of its members concurring with the Chair's conclusions as the reasons for denying the appeal.

The Board of Zoning Appeal is empowered to waive local zoning regulations only. This decision therefore does not relieve the petitioner in any way from the duty to comply with local ordinances and regulations of the other local agencies, including, but not limited to the Historical Commission, License Commission and/or compliance with requirements pursuant to the Building Code and other applicable codes.



Constantine Alexander, Chair

Attest: A true and correct copy of decision filed with the offices of the City Clerk and Planning Board on 4/26/19 by Maria Pacheco, Clerk.

Twenty days have elapsed since the filing of this decision.

No appeal has been filed _____.

Appeal has been filed and dismissed or denied.

Date: _____ City Clerk.

EXHIBIT B



EXHIBIT C

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

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FAX (617) 338-0737

OLYMPIA A. BOWKER, ESQ.
E-mail: obowker@mcgregorlaw.com
(617) 338-6464 ext. 122

VIA EMAIL AND HAND DELIVERY

January 14, 2019

Mr. David Byrne
Senior Building Inspector
Cambridge Inspectional Services Department
831 Massachusetts Avenue
Cambridge, MA 02139

**RE: Zoning Enforcement Request, Open Space District–Vellucci Plaza
Land Described in Book 13899, Page 554 in the Middlesex South Registry of Deeds
Our File No. 2833**

Dear Mr. Byrne:

This Firm represents Mike Repucci, John Pitkin, Sara Mar Berman, Jonathan Harris, and Debra Mandel, with respect to the proposed road re-configuration involving Vellucci Plaza in Inman Square. Each individual is a property owner in the Inman Square area, and Ms. Mandel and Mr. Repucci about the Project described below and will be uniquely harmed should the Project go forward without complying with the Cambridge Zoning Ordinances.

This is a formal request for enforcement under the Massachusetts Zoning Act, M.G.L. c. 40A, § 7 regarding work planned and being performed at Vellucci Plaza in Inman Square by the City of Cambridge.

The work proposed and being undertaken is the reconfiguration of the Hampshire Street and Cambridge Street intersection, re-routing Hampshire Street to run directly through the majority of Vellucci Plaza as it currently exists (the “Project”).¹

Specifically, our clients request enforcement because much of the Project will take place within an Open Space Zoning District under the Cambridge Zoning Ordinances. The Project is either prohibited entirely, or cannot commence without a Special Permit issued pursuant to Cambridge Zoning Ordinance § 4.12, and a report to the Planning Board with review procedures pursuant to § 4.25.

¹ The Project updates, schedule, background, and contact information is found at:

<https://www.cambridgema.gov/TheWorks/CityProjects/detail.aspx?path=%2fsitecore%2fcontent%2fhome%2ftheworks%2fcityprojects%2f2016%2finmansquare/>.

McGREGOR & LEGERE

In summary, the Project is on land protected as Zoned Open Space, cannot be unilaterally eliminated for a road construction project without a Special Permit or notification under the Cambridge Zoning Ordinance.

Vellucci Plaza Is Open Space Under Cambridge Zoning Ordinances

Section 3.10 of the Cambridge Zoning Ordinances divides the City into fifty classes of districts, including "Open Space District[s]", which are described as "public parks and recreation facilities and other public facilities." Cambridge Zoning Ordinance, § 3.11(1). The Zoning Map for Cambridge shows Vellucci Plaza as in an "Open Space" district.

Special Permit Required For Construction in Vellucci Plaza Under Bylaw

Section 4 of the Cambridge Zoning Ordinances provides Use Regulations for each district.

Cambridge Zoning Ordinance, § 4.25 states:

Non Open Space Uses in Open Space Districts. The purpose of this section is to provide for public notification and review of governmental and institutional nonopen space development statutorily exempt from prohibition in designated Open Space Districts. All uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance or other approval or before conveyance of any lot within the district.

Section 4.25 speaks directly to the Vellucci Plaza project. If the Vellucci Plaza Project is permitted under § 4.33.f, then it must also "comply with the procedural requirements of this Subsection prior to the issuance of any... special permit...."

However, if the Building Inspector determines that the Vellucci Plaza Project is not a use "statutorily exempt from prohibition" in the Designated Open Space District, then it is just that—a prohibited use.

The Proposed Project Is a Municipal Service Facility Under §4.33.f(4)

As § 4.25 provides, other than the uses allowed by right, only a use "statutorily exempt from prohibition" may take place in an Open Space District. Section 4.25 cites § 4.33.f, which lists the statutory exemptions to the prohibitions of use in Open Space Districts.

Among those listed in § 4.33.f is a "Municipal Service Facility." The Zoning Ordinance defines a "Municipal Service Facility" as: "use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, public works and similar governmental functions." Cambridge Zoning Ordinance, Article 2: Definitions.



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The City of Cambridge has plans to change the use of land in an Open Space Zoning District to construct a municipal intersection, crosswalks, bike lanes, sidewalks, and stop lights. This plan clearly involves the use of land by the City of Cambridge for public utilities, public works, and other similar government functions.

While § 4.33.f allows a "Municipal Service Facility" in Designated Open Space, that use requires the issuance of a Special Permit from the Zoning Board of Appeals. Cambridge Zoning Ordinance §4.12. This is an addition to the notice and reporting requirements of §4.25

The City of Cambridge does not have a Special Permit from the Zoning Board of Appeals for the installation and construction of a Municipal Service Facility in Vellucci Plaza, for which work has already begun (including tree removal approvals, and exploratory digging for utility relocation).

Further, the explicit criteria for a Special Permit, as provided in §10.43, are highly appropriate for review of a traffic reconfiguration project such as this. For example, Special Permit Criteria (b), "traffic generated or patterns of access or egress would cause congestion, hazard, or substantial change in the established neighborhood character."

The review that accompanies a Special Permit ensures that any such proposed project satisfies the purpose and criteria of the City's laws.

Public Open Space Prohibits Roadways

Should the Building Inspector determine that the roadways part of the proposed intersection reconfiguration at Vellucci Plaza is not a Municipal Service Facility, then the Ordinance indicates that such roadways are prohibited within Designated Open Space altogether.

The deed to Vellucci Plaza describes the land as "public recreation open space." This is a separate dedication from designated Open Space under the Cambridge Zoning Ordinance.

The Cambridge Zoning Ordinances define "Open Space, Public" as:

An area owned or controlled by the City of Cambridge or other public entity that is intended for public use, that is open to the sky and that is designed for either environmental, scenic, or recreation purposes. Public Open Space may include but is not limited to lawns, decorative plantings, interior walkways, abutting sidewalks, active and passive recreation areas, playgrounds, fountains, and public performance areas. Public Open Space shall not include ... parking lots, or driveways. Limited paved surfaces may be designed to accommodate occasional use by motor vehicles servicing the park facility....

Cambridge Zoning Ordinances, Article 2.00: Definitions (emphasis added)



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The Cambridge Zoning Ordinances unequivocally state that Public Open Space shall not include vehicular access, except in very limited circumstances—“the occasional use by motor vehicles servicing the park facility....” *Id.*

The construction of a four-way intersection which harbors more than 400 turning vehicles per hour is not “occasional”.² The Vellucci Plaza reconfiguration project runs directly counter to the heart of the Open Space Ordinance.

City Solicitor Letter Conflates Construction Projects with Laying Out of Public Way

We note the existence of City Solicitor Glowa’s April 2, 2018 letter on whether § 4.25 of the Cambridge Zoning Ordinance applies to the Inman Square project, but the long-established law of public ways contradicts her analysis.

The April 2, 2018 letter has several fatal flaws, most notably the conflation of “laying out a public way” with a road construction project. The April 2, 2018 letter sweepingly concluded that “the City may lay out public ways in a zoning district without obtaining zoning approval,” so therefore §4.25 of the Cambridge Zoning Ordinance doesn’t apply. Letter, page 3.

In the current project, the City seeks to relocate a portion of Hampshire Street—not laying out a new street. This is a significant distinction, as the laying out of a public way is governed by statutory provisions, such as M.G.L. c. 82 §§ 1-7 (county highways), and long-established case law has outlined the very specific provisions of layout. *See Fenn v. Town of Middleborough*, 7 Mass. App. Ct. 80 (1979).

Here, the City of Cambridge seeks to relocate a road (without following the process required by G.L. c. 82, § 2 if the street is indeed a public way) and for uses prohibited in an Open Space District without a Special Permit—or perhaps even prohibited entirely.

Further, the April 2, 2018 Letter erroneously concludes that the procedural requirements of §4.25 do not apply because “the redesign of Vellucci Plaza do[es] not include construction of any building or structure...” Letter, page 3. The plain language of the Ordinance prohibits “Non Open Space Uses”—it does not limit the prohibitions to structures.

If the April 2, 2018 letter were taken as accurate, then any Designated Open Space in Cambridge could be used for road widening and traffic reconfiguration without any review process under Zoning.

Conclusion

Our clients are direct abutters and close neighbors of the Property and the class of persons whom the Special Permit process is designed to protect. They are aggrieved by the Vellucci Plaza Road reconfiguration project going forward without proper process and substantive zoning oversight.

² Source: Inman Square Intersection Improvements Project.pdf, 2015 Existing Volumes (AM); MassDOT Separated Bike Lane Planning and Design Guide.



McGREGOR & LEGERE

On behalf of our clients, we hereby request that you rule affirmatively on our request and take all necessary and appropriate enforcement measures to ensure the City of Cambridge obtains all needed reviews and approvals and complies with all applicable Zoning Ordinances before commencing work on the project.

Sincerely,



Olympia A. Bowker

Cc: Owen O'Riordan
Commissioner, Cambridge Department of Public Works

Louis A. DePasquale
City Manager
City of Cambridge



EXHIBIT D



CITY OF CAMBRIDGE

INSPECTIONAL SERVICES DEPARTMENT 831 MASS. AVE.
CAMBRIDGE, MASSACHUSETTS 02139 (617) 349-6100

Ranjit Singanayagam
Commissioner

January 28, 2019

BY EMAIL AND FIRST-CLASS MAIL

Olympia A. Bowker, Esq.
McGregor & Legere
15 Court Square, Suite 500
Boston, MA 02108

Re: Response to Zoning Enforcement Request for Vellucci Plaza

Dear Ms. Bowker,

I am in receipt of your January 14, 2019 request for zoning enforcement on behalf of Mike Repucci, John Pitkin, Sara Mar Berman, Jonathan Harris and Debra Mandel. You have requested that the Cambridge Inspectional Services Department enforce the Cambridge Zoning Ordinance (the "Zoning Ordinance"), pursuant to G.L. c.40A, §7, regarding work planned and being performed at Vellucci Plaza in Inman Square, which is located within an Open Space Zoning District under the Zoning Ordinance. The work is being performed by the City of Cambridge (the "City") and is part of the Inman Square Intersection Safety Improvements Project, which includes the redesign of the Hampshire Street and Cambridge Street Intersection in Inman Square and the redesign and reconstruction of the City park known as Vellucci Plaza (the "Project").

Please be advised that, for the reasons set forth below, I decline to take any enforcement action concerning the Project as the Project does not violate the Zoning Ordinance.

As an initial matter, the layout, relocation or alteration of a public way is not subject to zoning. Harrison v. Textron, Inc., 367 Mass. 540, 549 (1975). Therefore, as with any roadway used and maintained as a public way, the City is not required to obtain relief from the Zoning Ordinance for the Project. It is irrelevant that the Project includes the relocation of a public way, rather than the initial layout of a public way. It is also of no consequence that you refer to the Project as a "road construction project" as opposed to the "layout of a public way." The road construction project is the means to accomplish the relocation of Hampshire Street and the redesign and reconstruction of Vellucci Plaza, which will then be accepted by a vote of the City Council.

You assert that the Project violates the Zoning Ordinance because there has been no Planning Board review pursuant to Zoning Ordinance Section 4.25. As stated above, Zoning

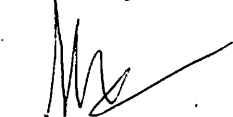
Ordinance Section 4.25 is not applicable to the Project because the Project is not subject to the Zoning Ordinance. Additionally, the procedure pursuant to Section 4.25 would not be applicable to the Project even if relocation of a public way was subject to the Zoning Ordinance. While section 4.25 of the Zoning Ordinance sets forth a procedure for review of "[g]overnmental and institutional non-open space development statutorily exempt from prohibition in designated Open Space Districts" and requires that "[a]ll uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance or other approval or before conveyance of any lot within the district" these procedural requirements are not applicable to the Project because the physical improvements and amenities that are being proposed for the Project do not include construction of any building or structure that would require either a building permit, variance or special permit and the proposed Project does not include uses set forth in Section 4.33.f, (other than a public park and recreational use). Thus the provisions of Section 4.25 of the Zoning Ordinance are not triggered by the Project.

You also assert that the Project violates the Zoning Ordinance because it would require a special permit as it is a Municipal Service Facility, pursuant to Zoning Ordinance Section 4.33.f and Article 2. The laying out, relocation or use of a public way is not subject to the Zoning Ordinance and does not fall under the definition of Municipal Service Facility, which is defined as "[the] use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, public works and similar governmental functions." A Municipal Service Facility is the use of land or structure by the City or other municipality, whereas, based on the plain meaning of "public way," it is the use of land by the public for travel. Any maintenance operations, public utilities or public works projects within a public way are for purposes of maintaining the public way or are incidental or accessory to the use of the public way for public travel. As also noted above, use of municipally owned land for a park or recreational use, such as the use of Vellucci Plaza as a park and for recreational open space use, is not subject to the requirements of Section 4.33.f and Article 2 of the Zoning Ordinance either.

Lastly, you assert that if the Project is not a Municipal Service Facility, it is prohibited because it does not fall under the definition of Public Open Space, pursuant to Zoning Ordinance Article 2. However, as stated above, neither the layout, relocation and use of a public way nor the redesign and reconstruction of a public park is subject to the Zoning Ordinance.

You have a right to appeal this determination pursuant to G.L. c.40A, §8 and Zoning Ordinance Article 10.00, Section 10.20.

Sincerely,



Ranjit Singanayagam
Commissioner

Inspectional Services Department

EXHIBIT E

BZA APPLICATION FORM

GENERAL INFORMATION

The undersigned hereby petitions the Board of Zoning Appeal for the following:

Special Permit: _____ Variance: _____ Appeal: ✓

PETITIONER: John Pitkin

PETITIONER'S ADDRESS: 18 Fayette St, Cambridge, MA 02139

LOCATION OF PROPERTY: 1407 Cambridge-St. (Vellucci Plaza)

TYPE OF OCCUPANCY: Open Space, Public ZONING DISTRICT: OS

REASON FOR PETITION:

_____ Additions	_____ New Structure
_____ Change in Use/Occupancy	_____ Parking
_____ Conversion to Addi'l Dwelling Unit's	_____ Sign
_____ Dormer	_____ Subdivision
_____ Other: _____	

DESCRIPTION OF PETITIONER'S PROPOSAL:

Appeal the letter from Commissioner of Inspectional Services dated
Jan. 28, 2019, regarding Zoning Enforcement Request for Vellucci Plaza

OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

2019 FEB - 1 AM 10:27

SECTIONS OF ZONING ORDINANCE CITED:

Article 10 Section 20

Article _____ Section _____

Article _____ Section _____

Applicants for a Variance must complete Pages 1-5
Applicants for a Special Permit must complete Pages 1-4 and 6
Applicants for an Appeal to the BZA of a Zoning determination by the
Inspectional Services Department must attach a statement concerning the reasons
for the appeal

Original Signature(s):

John Pitkin

(Petitioner(s)/Owner)

JOHN PITKIN

(Print Name)

Address:

18 FAYETTE ST.

CAMBRIDGE, MA 02139

Tel. No.:

617 388 4448

E-Mail Address:

john_pitkin@earthlink.net

Date:

2/1/19

CAMBRIDGE BOARD OF ZONING APPEAL

APPEAL TO THE CAMBRIDGE BOARD OF ZONING APPEAL OF THE DENIAL OF REQUEST FOR ZONING ENFORCEMENT BY THE COMMISSIONER OF THE INSPECTIONAL SERVICES DEPARTMENT, JANUARY 28, 2019

This is an appeal to overturn the decision by the Commissioner of the Inspectional Services Department to deny a request for enforcement of the provisions of Cambridge Zoning Ordinance § 4.12 requiring a Special Permit and § 4.25 requiring a report to, public hearing and review by the Planning Board for the City's "Inman Square Intersection Improvements Project" (the Project). A formal request for such enforcement was filed with Cambridge Building Inspector David Byrne on January 14, 2018, and a copy of this request is appended hereto. This request was denied by the Commissioner of Inspectional Services in a letter dated January 28, 2019, a copy of which is also appended.

The Project calls for routing Hampshire Street, a roadway, through Vellucci Plaza, which is used as a park and is zoned as Open Space. The determination of the Commissioner denied the request for enforcement on the grounds that streets are public ways and as such not subject to the provisions of M.G.L. c. 40A or the Cambridge Zoning Ordinance. This appeal is being made pursuant to M.G.L. c. 40A § 8 and Zoning Ordinance Article 10.00 Section 10.20.

The undersigned Michael Reppucci, Debra Mandel, Gary Mitchell and Aimee Baum, each own property abutting Vellucci Plaza and the Project described below and will be uniquely harmed should the Project go forward without complying with the Cambridge Zoning Ordinance.

- Michael Reppucci is proprietor of the Inman Pharmacy, an independent drug store, serving residents of the Inman Square area, greater Cambridge and the regional Portuguese-speaking population. The proposed realignment of Hampshire Street will almost double the volume of traffic passing in front of the Pharmacy, direct new headlight glare into the front window and entrance to the Pharmacy and create multiple new conflicts and hazards in the intersection fronting the Pharmacy, as shown in the appended exhibit titled "New Safety Flaws in the Plan for Inman Square: 2." Third, the elimination of up to half of the public parking spaces from the Inman Square business district will make it difficult for many of customers to pick up prescriptions from the Pharmacy. The continued operation of the Pharmacy will be adversely affected by the Project.
- Debra Mandel owns and resides in a condominium that abuts Hampshire Street and Vellucci Plaza. The reconfiguration of Hampshire Street will bring the large flows of traffic much closer to her living spaces which overlook Vellucci Plaza and greatly increase noise and air pollution. Loss of trees in the Plaza will further increase air pollution and extreme heat during the summer and extend a "heat island" that now forms along Cambridge Street to the east of Inman Square. Division and diminishment of the mini-park in Vellucci Plaza will eliminate a uniquely accessible passive open space amenity for residents of Inman Square.

OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

2019 FEB -1 AM 10:06

- Gary Mitchell and Aimee Baum are members of the Mitchell-Wheeler family who have owned and operated the S&S Restaurant and Deli in Inman Square for 100 years. The continued operation of this business will be adversely affected by the increase in street pavement, including bicycle lanes, at the expense of pedestrians, reduction in on-street public parking, creation of multiple new traffic hazards for pedestrians and changes in Inman Square's established character as a neighborhood business district.

The undersigned appellants request that the City be required to acquire a special permit for the Project before continuing work on the Project. The legal analysis for requiring such a special permit is set forth by Olympia A. Bowker in the request for enforcement dated January 14, 2019, a copy of which is appended hereto.

The undersigned appellants also seek what is plainly required by Cambridge Zoning Ordinance, § 4.25, a public report, hearing and review of the Project by the Planning Board:

Non Open Space Uses in Open Space Districts. The purpose of this section is to provide for public notification and review of governmental ... nonopen space development statutorily exempt from prohibition in designated Open Space Districts.

Vellucci Plaza is a designated Open Space district, and the proposed roadway through the Plaza is a "governmental nonopen space development." The Ordinance does not explicitly mention roadways as prohibited in Open Space districts, but the prohibition of driveways in Public Open Space districts (Article 2.00 definition of Open Space, Public) by extension implies that a roadway is not an open space development. Therefore it is a nonopen space development.

The required review calls for a report by the agency proposing the development to be submitted to the Planning Board and filed with City Clerk. This report is to include an evaluation of alternatives to the development, and

(4) Evaluation of the anticipated impacts of the development or property transfer on the remainder of the open space district, upon the ability of alternative park and recreation areas in the neighborhood and city to meet the needs served by the affected open space district which would be displaced by the proposed action, and upon other land uses in the neighborhood.

(5) Any other information reasonably determined pertinent by the Planning Board. (§ 4.25.1)

Such additional information for a roadway project might reasonably be expected to include changes in traffic patterns that "would cause congestion, hazard, or substantial change in the established neighborhood character," an explicit criterion for review of Special Permits (as provided in §10.43).

These issues go to the heart of the adverse effects of the Projects on the undersigned appellants. They deserve the public hearing and report by the Planning Board as required by § 4.25.2 and § 4.25.3. This report may include "recommendations concerning the proposed development."

The Project has already received approval for removal of public shade trees, a Certificate of Appropriateness by the Mid-Cambridge Conservation District Commission and approval for a Home Rule Petition by the City Council to the State Legislature for reuse of land protected by Article 97 of the State Constitution, without the issuance of special permit or a report, public hearing or review by the Planning Board. Also, preliminary site work including removal of four mature trees from Vellucci Plaza, on January 30, 2019, has already been carried out.

The appellants believe that a Planning Board review of a project of such importance for a major intersection, public open space, business district and neighborhood is appropriate, overdue, necessary, and required by the Cambridge Zoning Ordinance.

The appellants hereby request that the Board of Zoning Appeal overturn the Building Inspector's determination and order the City to apply for a Special Permit pursuant to Zoning Ordinance §4.12 and comply with the requirements of §4.25 before continuing work on the Project.

February 1, 2019

Appellants,

<p><i>Michael Reppucci</i> 1/30/2019 Michael Reppucci, Owner Inman Pharmacy, 1414 Cambridge St. Cambridge, MA 02139</p>	<p><i>Debra Mandel</i> Debra Mandel 240 Hampshire St. Cambridge, MA 02139</p>
<p><i>Michael Carr</i> 1/30/2019 Michael Carr 4 Beacon St. Cambridge, MA 02139 Somerville, MA</p>	<p><i>Gary Mitchell</i> 1/30/2019 Gary Mitchell, Owner S&S Restaurant and Deli, 1334 Cambridge St. Cambridge, MA 02139</p>
<p><i>Aimee Baym</i> 1/30/2019 Aimee Baym, Mgr, S&S Restaurant and Deli, 1334 Cambridge St. Cambridge, MA 02139</p>	<p><i>John Pitkin</i> 1/30/2019 John Pitkin 18 Fayette St. Cambridge, MA 02139</p>
<p><i>Jonathan M. Harris</i> 1/30/2019 Jonathan M. Harris 9 North Ave. Cambridge, MA 02139</p>	<p><i>Sara Mae Berman</i> 1/20/2019 Sara Mae Berman 25 Fayette St. Cambridge, MA 02139</p>
<p>_____ Cambridge, MA 2013</p>	<p>_____ Cambridge, MA 2013</p>
<p>_____ Cambridge, MA 2013</p>	<p>_____ Cambridge, MA 2013</p>

ATTACHMENTS

1. Request by Olympia A. Bowker, Esq., to Cambridge Building Inspector David Byrne, filed January 14, 2018, *re*: "Zoning Enforcement Request, Open Space District-Vellucci Plaza."
2. Letter from Commissioner of Inspectional Services to Olympia A. Bowker, dated January 28, 2019, *re*: "Response for Zoning Enforcement Request for Vellucci Plaza."
3. Infographic titled "New Safety Flaws in the Plan for Inman Square:2." From the Friends of Inman Square, <https://saveinmansquare.com/safety-flaws/>

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

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FAX (617) 338-0737

OLYMPIA A. BOWKER, ESQ.
E-mail: obowker@mcgregorlaw.com
(617) 338-6464 ext. 122

VIA EMAIL AND HAND DELIVERY

January 14, 2019

Mr. David Byrne
Senior Building Inspector
Cambridge Inspectional Services Department
831 Massachusetts Avenue
Cambridge, MA 02139

**RE: Zoning Enforcement Request, Open Space District–Vellucci Plaza
Land Described in Book 13899, Page 554 in the Middlesex South Registry of Deeds
Our File No. 2833**

Dear Mr. Byrne:

This Firm represents Mike Repucci, John Pitkin, Sara Mar Berman, Jonathan Harris, and Debra Mandel, with respect to the proposed road re-configuration involving Vellucci Plaza in Inman Square. Each individual is a property owner in the Inman Square area, and Ms. Mandel and Mr. Repucci about the Project described below and will be uniquely harmed should the Project go forward without complying with the Cambridge Zoning Ordinances.

This is a formal request for enforcement under the Massachusetts Zoning Act, M.G.L. c. 40A, § 7 regarding work planned and being performed at Vellucci Plaza in Inman Square by the City of Cambridge.

The work proposed and being undertaken is the reconfiguration of the Hampshire Street and Cambridge Street intersection, re-routing Hampshire Street to run directly through the majority of Vellucci Plaza as it currently exists (the "Project").¹

Specifically, our clients request enforcement because much of the Project will take place within an Open Space Zoning District under the Cambridge Zoning Ordinances. The Project is either prohibited entirely, or cannot commence without a Special Permit issued pursuant to Cambridge Zoning Ordinance § 4.12, and a report to the Planning Board with review procedures pursuant to § 4.25.

¹ The Project updates, schedule, background, and contact information is found at:
<https://www.cambridgema.gov/TheWorks/CityProjects/detail.aspx?path=%2fsitecore%2fcontent%2fhome%2ftheworks%2fcityprojects%2f2016%2finmansquare/>.

McGREGOR & LEGERE

In summary, the Project is on land protected as Zoned Open Space, cannot be unilaterally eliminated for a road construction project without a Special Permit or notification under the Cambridge Zoning Ordinance.

Vellucci Plaza Is Open Space Under Cambridge Zoning Ordinances

Section 3.10 of the Cambridge Zoning Ordinances divides the City into fifty classes of districts, including "Open Space District[s]", which are described as "public parks and recreation facilities and other public facilities." Cambridge Zoning Ordinance, § 3.11(1). The Zoning Map for Cambridge shows Vellucci Plaza as in an "Open Space" district.

Special Permit Required For Construction in Vellucci Plaza Under Bylaw

Section 4 of the Cambridge Zoning Ordinances provides Use Regulations for each district.

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Section 4.25 speaks directly to the Vellucci Plaza project. If the Vellucci Plaza Project is permitted under § 4.33.f, then it must also "comply with the procedural requirements of this Subsection prior to the issuance of any... special permit...."

However, if the Building Inspector determines that the Vellucci Plaza Project is not a use "statutorily exempt from prohibition" in the Designated Open Space District, then it is just that—a prohibited use.

The Proposed Project Is a Municipal Service Facility Under §4.33.f(4)

As § 4.25 provides, other than the uses allowed by right, only a use "statutorily exempt from prohibition" may take place in an Open Space District. Section 4.25 cites § 4.33.f, which lists the statutory exemptions to the prohibitions of use in Open Space Districts.

Among those listed in § 4.33.f is a "Municipal Service Facility." The Zoning Ordinance defines a "Municipal Service Facility" as: "use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, public works and similar governmental functions." Cambridge Zoning Ordinance, Article 2: Definitions.



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The City of Cambridge has plans to change the use of land in an Open Space Zoning District to construct a municipal intersection, crosswalks, bike lanes, sidewalks, and stop lights. This plan clearly involves the use of land by the City of Cambridge for public utilities, public works, and other similar government functions.

While § 4.33.f allows a "Municipal Service Facility" in Designated Open Space, that use requires the issuance of a Special Permit from the Zoning Board of Appeals. Cambridge Zoning Ordinance §4.12. This is an addition to the notice and reporting requirements of §4.25.

The City of Cambridge does not have a Special Permit from the Zoning Board of Appeals for the installation and construction of a Municipal Service Facility in Vellucci Plaza, for which work has already begun (including tree removal approvals, and exploratory digging for utility relocation).

Further, the explicit criteria for a Special Permit, as provided in §10.43, are highly appropriate for review of a traffic reconfiguration project such as this. For example, Special Permit Criteria (b), "traffic generated or patterns of access or egress would cause congestion, hazard, or substantial change in the established neighborhood character."

The review that accompanies a Special Permit ensures that any such proposed project satisfies the purpose and criteria of the City's laws.

Public Open Space Prohibits Roadways

Should the Building Inspector determine that the roadways part of the proposed intersection reconfiguration at Vellucci Plaza is not a Municipal Service Facility, then the Ordinance indicates that such roadways are prohibited within Designated Open Space altogether.

The deed to Vellucci Plaza describes the land as "public recreation open space." This is a separate dedication from designated Open Space under the Cambridge Zoning Ordinance.

The Cambridge Zoning Ordinances define "Open Space, Public" as:

An area owned or controlled by the City of Cambridge or other public entity that is intended for public use, that is open to the sky and that is designed for either environmental, scenic, or recreation purposes. Public Open Space may include but is not limited to lawns, decorative plantings, interior walkways, abutting sidewalks, active and passive recreation areas, playgrounds, fountains, and public performance areas. Public Open Space shall not include ... parking lots, or driveways. Limited paved surfaces may be designed to accommodate occasional use by motor vehicles servicing the park facility....

Cambridge Zoning Ordinances, Article 2.00: Definitions (emphasis added)



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The Cambridge Zoning Ordinances unequivocally state that Public Open Space shall not include vehicular access, except in very limited circumstances—“the occasional use by motor vehicles servicing the park facility....” *Id.*

The construction of a four-way intersection which harbors more than 400 turning vehicles per hour is not “occasional”.² The Vellucci Plaza reconfiguration project runs directly counter to the heart of the Open Space Ordinance.

City Solicitor Letter Conflates Construction Projects with Laying Out of Public Way

We note the existence of City Solicitor Glowa’s April 2, 2018 letter on whether § 4.25 of the Cambridge Zoning Ordinance applies to the Inman Square project, but the long-established law of public ways contradicts her analysis.

The April 2, 2018 letter has several fatal flaws, most notably the conflation of “laying out a public way” with a road construction project. The April 2, 2018 letter sweepingly concluded that “the City may lay out public ways in a zoning district without obtaining zoning approval,” so therefore §4.25 of the Cambridge Zoning Ordinance doesn’t apply. Letter, page 3.

In the current project, the City seeks to relocate a portion of Hampshire Street—not laying out a new street. This is a significant distinction, as the laying out of a public way is governed by statutory provisions, such as M.G.L. c. 82 §§ 1-7 (county highways), and long-established case law has outlined the very specific provisions of layout. *See Fenn v. Town of Middleborough*, 7 Mass. App. Ct. 80 (1979).

Here, the City of Cambridge seeks to relocate a road (without following the process required by G.L. c. 82, § 2 if the street is indeed a public way) and for uses prohibited in an Open Space District without a Special Permit—or perhaps even prohibited entirely.

Further, the April 2, 2018 Letter erroneously concludes that the procedural requirements of §4.25 do not apply because “the redesign of Vellucci Plaza do[es] not include construction of any building or structure...” Letter, page 3. The plain language of the Ordinance prohibits “Non Open Space Uses”—it does not limit the prohibitions to structures.

If the April 2, 2018 letter were taken as accurate, then any Designated Open Space in Cambridge could be used for road widening and traffic reconfiguration without any review process under Zoning.

Conclusion

Our clients are direct abutters and close neighbors of the Property and the class of persons whom the Special Permit process is designed to protect. They are aggrieved by the Vellucci Plaza Road reconfiguration project going forward without proper process and substantive zoning oversight.

² Source: Inman Square Intersection Improvements Project.pdf, 2015 Existing Volumes (AM); MassDOT Separated Bike Lane Planning and Design Guide.



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On behalf of our clients, we hereby request that you rule affirmatively on our request and take all necessary and appropriate enforcement measures to ensure the City of Cambridge obtains all needed reviews and approvals and complies with all applicable Zoning Ordinances before commencing work on the project.

Sincerely,



Olympia A. Bowker

Cc: Owen O'Riordan
Commissioner, Cambridge Department of Public Works

Louis A. DePasquale
City Manager
City of Cambridge



Printed on recycled paper.



CITY OF CAMBRIDGE

INSPECTIONAL SERVICES DEPARTMENT 831 MASS. AVE.
CAMBRIDGE, MASSACHUSETTS 02139 (617) 349-6100

Ranjit Singanayagam
Commissioner

January 28, 2019

BY EMAIL AND FIRST-CLASS MAIL

Olympia A. Bowker, Esq.
McGregor & Legere
15 Court Square, Suite 500
Boston, MA 02108

Re: Response to Zoning Enforcement Request for Vellucci Plaza

Dear Ms. Bowker,

I am in receipt of your January 14, 2019 request for zoning enforcement on behalf of Mike Repucci, John Pitkin, Sara Mar Berman, Jonathan Harris and Debra Mandel. You have requested that the Cambridge Inspectional Services Department enforce the Cambridge Zoning Ordinance (the "Zoning Ordinance"), pursuant to G.L. c.40A, §7, regarding work planned and being performed at Vellucci Plaza in Inman Square, which is located within an Open Space Zoning District under the Zoning Ordinance. The work is being performed by the City of Cambridge (the "City") and is part of the Inman Square Intersection Safety Improvements Project, which includes the redesign of the Hampshire Street and Cambridge Street Intersection in Inman Square and the redesign and reconstruction of the City park known as Vellucci Plaza (the "Project").

Please be advised that, for the reasons set forth below, I decline to take any enforcement action concerning the Project as the Project does not violate the Zoning Ordinance.

As an initial matter, the layout, relocation or alteration of a public way is not subject to zoning. Harrison v. Textron, Inc., 367 Mass. 540, 549 (1975). Therefore, as with any roadway used and maintained as a public way, the City is not required to obtain relief from the Zoning Ordinance for the Project. It is irrelevant that the Project includes the relocation of a public way, rather than the initial layout of a public way. It is also of no consequence that you refer to the Project as a "road construction project" as opposed to the "layout of a public way." The road construction project is the means to accomplish the relocation of Hampshire Street and the redesign and reconstruction of Vellucci Plaza, which will then be accepted by a vote of the City Council.

You assert that the Project violates the Zoning Ordinance because there has been no Planning Board review pursuant to Zoning Ordinance Section 4.25. As stated above, Zoning

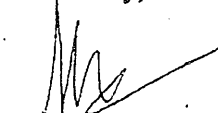
Ordinance Section 4.25 is not applicable to the Project because the Project is not subject to the Zoning Ordinance. Additionally, the procedure pursuant to Section 4.25 would not be applicable to the Project even if relocation of a public way was subject to the Zoning Ordinance. While section 4.25 of the Zoning Ordinance sets forth a procedure for review of "[g]overnmental and institutional non-open space development statutorily exempt from prohibition in designated Open Space Districts" and requires that "[a]ll uses in an Open Space District other than a park or recreation use permitted by Subsection 4.33.f shall comply with the procedural requirements of this Subsection prior to the issuance of any building or special permit, variance or other approval or before conveyance of any lot within the district" these procedural requirements are not applicable to the Project because the physical improvements and amenities that are being proposed for the Project do not include construction of any building or structure that would require either a building permit, variance or special permit and the proposed Project does not include uses set forth in Section 4.33.f, (other than a public park and recreational use). Thus the provisions of Section 4.25 of the Zoning Ordinance are not triggered by the Project.

You also assert that the Project violates the Zoning Ordinance because it would require a special permit as it is a Municipal Service Facility, pursuant to Zoning Ordinance Section 4.33.f and Article 2. The laying out, relocation or use of a public way is not subject to the Zoning Ordinance and does not fall under the definition of Municipal Service Facility, which is defined as "[the] use of land or structures by the City of Cambridge or other municipality for maintenance operations, public utilities, public works and similar governmental functions." A Municipal Service Facility is the use of land or structure by the City or other municipality, whereas, based on the plain meaning of "public way," it is the use of land by the public for travel. Any maintenance operations, public utilities or public works projects within a public way are for purposes of maintaining the public way or are incidental or accessory to the use of the public way for public travel. As also noted above, use of municipally owned land for a park or recreational use, such as the use of Vellucci Plaza as a park and for recreational open space use, is not subject to the requirements of Section 4.33.f and Article 2 of the Zoning Ordinance either.

Lastly, you assert that if the Project is not a Municipal Service Facility, it is prohibited because it does not fall under the definition of Public Open Space, pursuant to Zoning Ordinance Article 2. However, as stated above, neither the layout, relocation and use of a public way nor the redesign and reconstruction of a public park is subject to the Zoning Ordinance.

You have a right to appeal this determination pursuant to G.L. c.40A, §8 and Zoning Ordinance Article 10.00, Section 10.20.

Sincerely,



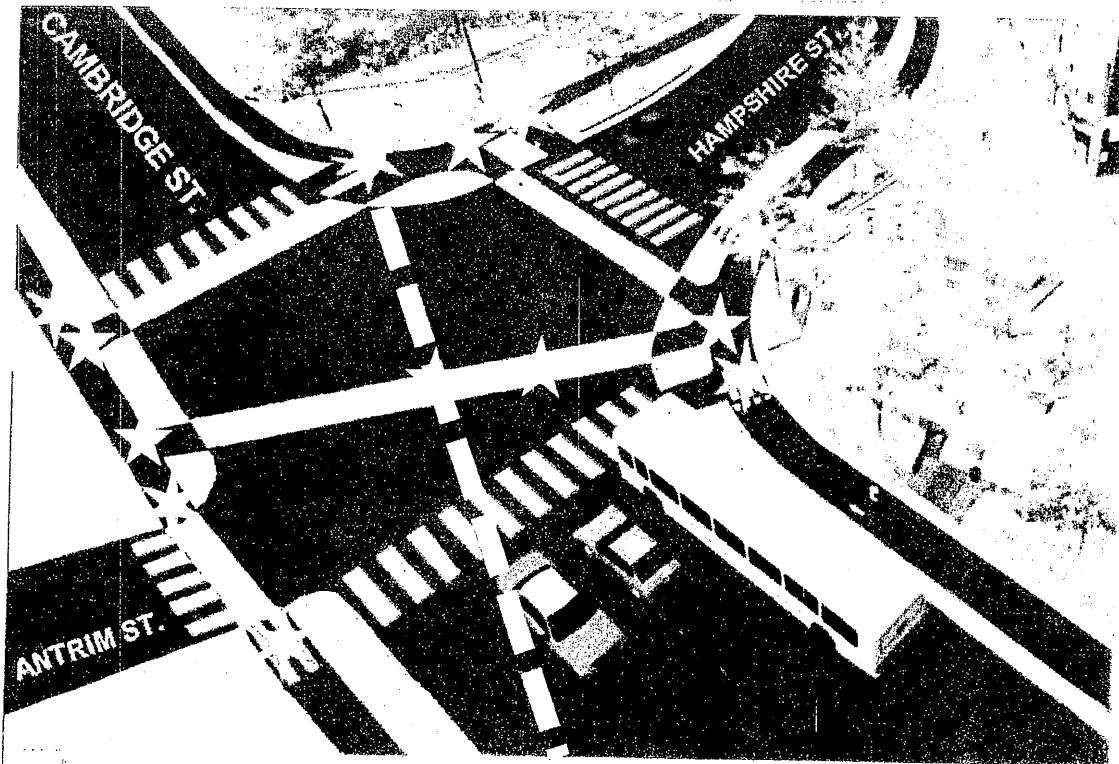
Ranjit Singanayagam
Commissioner

Inspectional Services Department

New Safety Flaws in the Plan for Inman Square: 2

In another signal phase in the Plan all vehicles will be stopped for bicycles and pedestrians to cross the intersection.

This pattern will create a "free for all" with numerous uncontrolled conflicts for both pedestrians and cyclists.



POTENTIAL PEDESTRIAN/BICYCLE POINTS OF CONFLICT

POTENTIAL BICYCLE-BICYCLE POINTS OF CONFLICT

BICYCLE DESIRE LINE FROM VELLUCCI PLAZA WEST TO HAMPSHIRE
STREET SOUTH

During the same signal phase further east on Cambridge Street there will be two other new potential pedestrian-bicycle points of conflict as well as two new vehicle-pedestrian and one new vehicle-bicycle points of conflict X.

None of these potential conflicts are controlled by signals

None of these safety hazards exist in Inman Square today.

